

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE

Alvin B. Galuten, MD, PSC,)	
)	
Plaintiff)	
)	
Medicus Radiology Staffing, LLC,)	
)	
Defendant)	
)	

Civil Action No. 10-cv-155-SM

**DEFENDANT’S MOTION FOR JUDGMENT ON THE PLEADINGS WITH RESPECT
TO PLAINTIFF’S CLAIM FOR VIOLATION OF RSA 358-A**

1. Plaintiff asserts two claims: (1) breach of contract and (2) violation of New Hampshire’s Consumer Protection Act, RSA 358-A [hereinafter, the “Act”].

2. Plaintiff’s claim for violation of the Act is subject to dismissal because, when fairly construed, it is nothing more than a restatement of his claim for breach of contract. The New Hampshire Supreme Court has held that claims for breach of contract cannot support a claim under the Act and that breaches of contract do not amount to prohibited conduct under the Act. State v. Moran, 151 N.H. 450, 861 A.2d 763 (2004); Barrows v. Boles, 141 N.H. 382, 687 A.2d 979 (1996).

3. Even to the extent Plaintiff alleges that Defendant falsely manufactured a justification to breach the parties’ contract, courts have held that alleged “sham justifications” are not actionable under consumer protection statutes. See Atkinson v. Rosenthal, 598 N.E.2d 666, 670 (Mass. App. Ct. 1992); Armstrong v. Epstein, 2009 WL 3086010 (Mass. Super. Ct. Aug. 25, 2009); Clay Chevrolet, Inc. v. Hatziliades, 2007 WL 2705939, *2 (Mass. Super. Ct. Aug. 24, 2007).

4. Finally, Plaintiff fails to satisfy the pleading requirements pronounced by the United States Supreme Court in Ashcroft v. Iqbal, 129 S.Ct 1937 (2008) and Bell Atlantic v. Twombly, 550 U.S. 544 (2007). Courts applying those cases to claims under consumer protection statutes have dismissed claims with paltry factual allegations similar to the Plaintiff's Complaint in this case. See Morris v. BAC Home Loans Servicing, L.P., ___ F.Supp.2d ___, 2011 WL 1226974, *7 (D. Mass. Apr. 4, 2011).

5. A memorandum of law is submitted herewith.

6. Given the nature of the relief requested, Defendant did not attempt to obtain the assent of Plaintiff prior to filing this motion.

WHEREFORE, Defendant respectfully requests that this Court:

- A. Dismiss Count II of Plaintiff's Complaint; and
- B. Grant such additional and further relief as the Court deems necessary.

Respectfully submitted,

MEDICUS RADIOLOGY STAFFING, LLC

By Their Attorneys,

SHEEHAN PHINNEY BASS + GREEN,
PROFESSIONAL ASSOCIATION

Dated: April 18, 2011

By: /s/ David W. McGrath
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Certification of Service

I hereby certify that on this 18th day of April, 2011, I electronically filed the foregoing with the Clerk of the United States District Court for the District of New Hampshire, using the CM/ECF system, which will send notification to the following counsel of record:

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